United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 31, 2005

TO : Curtis Wells, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: SeaRiver Maritime, Inc.
Case 16-CA-23977 530-6083-0100
725-6733-3000

This Section 8(a)(5) case presents the question whether the Respiratory Protection Program Memorandum of Understanding is part of the parties' current collective bargaining agreement and, therefore, whether the Employer violated the Act when it implemented changes to the Memorandum of Understanding mid-term of the contract.

We conclude that the Memorandum of Understanding is not part of the parties' current collective bargaining agreement, and that the Employer did not violate the Act when it implemented changes to the Memorandum of Understanding after giving the Union notice of, and an opportunity to bargain over, those proposed changes.

FACTS

SeaRiver Maritime (the Employer) is a maritime shipping company that transports petroleum products primarily in the United States but also internationally. Exxon's Seamen's Union (the Union) represents the Employer's unlicensed personnel employed in the Deck, Steward's and Engine Departments of the Employer's American flag oceangoing vessels. Since 1976 the Union and Employer have been parties to several collective bargaining agreements.

In April 1991, the Employer and Union negotiated a collective bargaining agreement that ran until August, 1993. After the 1991 agreement was executed, but before it was printed, the Employer announced that it was implementing a clean-shaven policy to ensure that employee respirators fit properly. The Union requested bargaining and subsequently, after several rounds of discussions, the Respiratory Protection Program Memorandum of Understanding (RPP MOU) was signed by both parties on August 17, 1991. The RPP MOU has eleven clauses. One clause is the Winter (Arctic) Weather Clothing program. Under the terms of the Winter Weather Clothing program employees are allowed to purchase, out of pocket, up to $300.00 of cold weather gear every three years from the vendor of their choice and are required to submit

receipts to the Employer for reimbursement.[1] From 1991 to the present, the RPP MOU has been included at the back of all bound collective bargaining contracts under a separate tab entitled Side Letters. There are eleven different Memoranda of Understanding under the Side Letters tab in the 2002-2005 collective bargaining agreement.

The Union asserts that the RPP MOU is the procedure for the purchase of safety gear and is directly incorporated into the collective bargaining agreement via Article XII of the collective bargaining agreement. Article XII, General Working Rules for All Departments, paragraph 1, entitled Safety reads:

> The Company will continue its policy of exercising due diligence in furnishing safe gear and working equipment and in making every reasonable effort to provide safe working conditions on board vessels at all times. The Union agrees to urge its members to promote safety practices at all times. Unlicensed personnel shall attend training programs as required. Overtime at applicable rates will be paid for attendance at training classes in excess of employee's normal eight hours of work.

The Employer asserts that the RPP MOU has never been part of the collective bargaining agreement, but is a separate side contract that gives the parties flexibility to address unforeseen circumstances and areas where the collective bargaining agreement is silent. The Employer contends that there is no language in either the contract or the RPP MOU incorporating the RPP MOU into the collective bargaining agreement. The Employer also states that the separate nature of the contracts is demonstrated by the differing contractual dates. The collective bargaining agreement has a beginning and an end date, whereas the side letters, RPP MOU included, are dated only at the time of signing, with no established duration. Additionally, the Employer asserts that modifications have been made to MOUs contained in the Side Letters tab apart from formal contract negotiations.[2]

---

[1] The allowable purchases under the Winter (Arctic) Weather Clothing program are outerwear, rain gear, thermal underwear and insulated winter boots.

[2] In 1998 the Employer and Union met apart from formal contract negotiations and successfully negotiated changes to the Occupational Health Monitoring agreement dated December 12, 1991.

The RPP MOU remained unchanged from 1991 until 2002. In 2002 the Union and Employer met to negotiate a new collective bargaining agreement. The Employer claims that the parties agreed to discuss the RPP MOU at the same time as the main collective bargaining agreement for the sake of convenience. Bargaining notes show that on April 29, 2002, the Union's first proposal requested amendments to the RPP MOU. Specifically, the Union proposed monetary increases in the allowances for safety shoes, arctic clothing, safety glasses, as well as an amendment to the RPP MOU reflecting an expiration date coinciding with the 2002 contract expiration date. The Union's bargaining notes reflect that after caucusing, the Employer representative stated, Any of the MOU's – we have no interest in negotiating them. They are outside the contract. We don't want to tie them to the contract.[3] The Union responded, If we came to you in the future with a MOU, will you talk about them? The Employer answered affirmatively.

Bargaining notes reflect that while the Union continued to advocate in its second proposal for an alignment of the expiration date of the RPP MOU to that of the contract and for increased allowances for winter weather clothing, the Union stated, We don't agree with you on the MOU. That they are not part and parcel to the contract. After this comment, there was no further mention by either party as to the contractual status of the MOUs. As negotiations continued, the Employer and Union agreed to a monetary increase in the safety shoe allowance from $150.00 to $175.00, but did not agree to increased allowances for winter weather clothing or safety glasses. The increase in the safety shoe allowance is reflected in the current RPP MOU.

The Union asserts that the Employer's termination of an employee in 2003 for violating the RPP MOU and processing a separate grievance for a RPP MOU violation in 2004 demonstrate that the Employer believes the RPP MOU is tied to the collective bargaining agreement.[4] The Employer

---

[3] The Union maintains that the Employer's statement concerning MOU's being outside the contract was a statement of the Employer's opinion related to the proposal by the Union to align the expiration date of the MOU with the contract but not to the substance of the MOU.

[4] In 2003, the Employer terminated an employee for submitting false receipts for allegedly purchased safety gear. The Employer informed the Union that the employee's termination was the results of his submitting numerous false receipts for safety gear over the past several years

maintains that the processing of a grievance is not an admission that any claim in the grievance is valid or covered by the collective bargaining agreement. The Employer relies on Article VI, Section 9 of the collective bargaining agreement which states, the processing of a complaint as a grievance ... is not an agreement by either that Union or the Company that the claim is, in fact, a grievance.

The current charge is a result of the Employer's January 1, 2005, change of the RPP MOU. On September 15, 2004,[5] the Employer notified the Union that effective October 15, the maximum winter weather clothing reimbursement for oceangoing employees would be raised to $350.00 every three years but employees would no longer be allowed to purchase arctic clothing directly from a vendor of their choice and submit a request for reimbursement, but instead would be required to purchase their cold weather clothing from a mail order company, ARAMARK.

In response on September 22, the Union informed the Employer that its proposed unilateral change to a mandatory subject of bargaining was unacceptable. The Union asserted that the RPP MOU was bargained in 1991 and had been part of the collective bargaining agreement since that time. The Union stated it was cognizant of the fact that the parties were approximately six months away from re-negotiating the collective bargaining contract, and therefore saw no advantage or urgency in addressing the Employer's proposed change at that present time.

By letter dated October 12, the Employer stated that, in light of the Union's request to bargain, it agreed to delay the implementation of its proposed change to January 1, 2005. The Employer asserted that the $300.00 Winter Weather subsidy would remain the same, but that it still intended to change the administration of the Winter Weather Clothing program. The Employer stated that it had been, and

---

in violation of Company Posted Offenses … and the Side Letter MOU on Respiratory Protection Program, Section 11B. In a separate incident, in 2004, the Union submitted a grievance on behalf on an employee who was suspended for seeking reimbursement for an item not covered by the Winter Weather Clothing reimbursement program. The Employer responded that due to the employee's cooperation in the investigation it would reinstate the employee, restore lost pay and revise the employee's personnel records to reflect accordingly.

[5] All dates hereinafter are 2004, unless otherwise noted.

remained, willing to bargain concerning the proposed changes and would meet with the Union at its earliest convenience.

The Union responded on October 14, advising the Employer that the Union had not asked to bargain and was not interested in bargaining the matter outside regular contract negotiations. The Union stated that it viewed the Employer's proposed change to the Winter Clothing Program as a mandatory subject of bargaining and refused to enter into piece-meal negotiations.

On October 22, the Employer informed the Union that the RPP MOU was not part of the parties' collective bargaining agreement. The Employer asserted that the Union had the obligation to request bargaining if it had any concerns about the proposed changes to the Winter Weather Clothing program. The Company reiterated that it was willing to bargain with the Union.

In reply on October 22, the Union emailed the Employer and stated that it did not waive any right to bargain over the Employer's proposed changes.

On January 1, 2005, the Employer implemented its proposed changes.

ACTION

We conclude that the Respiratory Protection Program Memorandum of Understanding is not part of the parties' current collective bargaining agreement, and that the Employer did not violate the Act when it implemented changes to the Memorandum of Understanding after notifying the Union of the proposed changes.

Whether the collective bargaining agreement and addendum were part of the same contract is determined by examining the intent of the parties. For example, in Adkins v. Times World Corp.[6] the court looked at the language of the addendum, the negotiation history of the addendum, and whether the parties' conduct indicated an understanding that the two documents represented one composite group of

---

[6] 771 F.2d 829, 831 (4th Cir. 1985), cert denied 474 U.S. 1109 (1986)(concluding that an addendum executed at the completion of collective bargaining negotiations, guaranteeing job security until retirement age for certain journeyman, was part of the collective bargaining agreement).

obligations.[7] The court in Adkins determined that the addendum and the collective bargaining contract were part of the same contract. In examining the language of the addendum, the court noted that the very title of the instrument, 'addendum,' suggests an inseparable link to another instrument.[8] Moreover, the court observed that the addendum commences with notwithstanding anything to the contrary in the aforesaid agreement.[9] The court reasoned that this language tightens the bond between the collective bargaining agreement and the addendum. When reviewing the negotiation history of the addendum, the court concluded that the addendum had no existence separate from the collective bargaining agreement. The addendum was executed at the completion of a collective bargaining agreement, and re-executed upon the renewal of the following three collective bargaining agreements. Finally, the court observed that in addition to both the employer and union acknowledging that both documents were part of the same contract, one of the plaintiffs in the case, a laid off journeymen and president of the local union, understood the addendum to be part of the collective bargaining contract as he initially filed a grievance concerning the layoffs, thereby invoking the grievance and arbitration provisions of the collective bargaining agreement.

Applying the standard set forth in Adkins to the instant case, the language of the documents does not support that the parties intended the RPP MOU and the collective bargaining contract to comprise one agreement. There is no language in the RPP MOU that refers specifically to the collective bargaining agreement. Similarly, there is no language in the collective bargaining agreement directly referencing the RPP MOU. The opening language of the RPP MOU reads, the following constitutes agreement between [the Employer] and [the Union] as to implementation of the Company's Respirator Fit Guidelines and certain other health and safety matters as set forth herein. A connection between the RPP MOU and the collective bargaining agreement cannot be ascertained by any language in the RPP MOU or the collective bargaining agreement. By contrast, there is language in the collective bargaining agreement that may

---

[7] Cf. Cutter Laboratories, Inc., 265 NLRB 577 (1982) (employer's refusal to sign collective bargaining agreement based on incorporation of side letter detailing health care benefits without caveat language found unlawful where employer and the union evinced their intention to integrate side letter into the agreement).

[8] 771 F.2d at 832.

[9] Ibid.

incorporate other Memoranda of Understanding. For example, Article V (entitled Discipline) of the collective bargaining agreement states, the Posted Rules are listed under the SIDE LETTERS tab of this agreement. Similarly, language in other Memoranda of Understanding explicitly reference the collective bargaining agreement. For example, the Memorandum of Understanding H-S-M Subsidy commences with the language, the following constitutes agreement … as to certain understandings, interpretations and applications of Article XXIV, Section 2 (Hospital- Surgical- Medical Plan).

The negotiation history of the RRP MOU also does not evidence that the parties intended the RPP MOU to be part and parcel of the collective bargaining contract. Similarly to Adkins, the RPP MOU was negotiated after completion of the parties' 1991 collective bargaining contract. However, unlike Adkins, the Union and Employer have subsequently renegotiated two collective bargaining contracts without re-executing or renegotiating the terms of the RPP MOU. The RPP MOU remained untouched for 11 years.

Lastly, the invocation of the contractual grievance process with regard to alleged violations of the RPP MOU does not demonstrate that the RPP MOU is part of the contract. The Employer terminated one employee for violating the RPP MOU and the Union filed a grievance regarding the discipline of another employee for violating the RPP MOU. Unlike Adkins, Article VI, Section 9 in the main collective bargaining agreement specifically provides that processing of a complaint as a grievance is not an agreement that the complaint is, in fact, a grievance. This provision thus negates any inference that a processing of a grievance over the RPP MOU is an admission that the RPP MOU is part of the conract. Additionally, unlike Adkins, there is not a meeting of the minds by the Employer and Union that the RPP is in fact part and parcel of the collective bargaining contract. Both the Union and Employer clearly stated during 2002 negotiations that they held opposing views as to the contractual status of the RPP MOU.

Where a mandatory subject of bargaining is not contained in a contract, the employer must bargain in good faith to impasse with the union representative over its proposal regarding that subject, and if no agreement is reached, the employer may unilaterally implement its bargaining proposal even if the parties are mid-term in their labor contract.[10] Conversely, if a mandatory subject

---

[10] Milwaukee Spring Division Of Illinois Coil Spring Company, 268 NLRB 601, 602 (1984), enfd. 765 F.2d 175 (D.C. Cir. 1985)(although the Board found the matter of wage

is contained in the contract, neither party may require the other to bargain over the subject, nor unilaterally implement a change in the status quo concerning a mandatory subject, even after bargaining to impasse.[11] Mandatory subjects of bargaining may be contained in a contract not only through explicit reference but also through general waivers in the contract of a duty to bargain, such as zipper clauses.[12]

Applying the standard as set forth in Milwaukee Spring, we find that the RPP MOU is not contained in the collective bargaining agreement. The provisions of the RPP, which relate to the occupational health and safety of employees, are mandatory subjects of bargaining.[13] However, unlike in Milwaukee Spring, the collective bargaining agreement in question does not contain a zipper clause or a general waiver to bargain. Nor, as discussed above, is the RPP MOU explicitly referenced in the collective bargaining agreement.[14] Without either explicit reference or a zipper clause, it cannot be said that the RPP MOU is contained in the collective bargaining agreement thereby limiting the Employer's right to propose modifications.

Although we find that the RPP MOU is a distinct contract from the collective bargaining agreement, the RPP MOU is in and of itself a collective bargaining contract concerning mandatory subjects of bargaining, and subject to the 8(a)(5) and 8(d) rules of bargaining. Since the RPP MOU is without an expiration date, the Employer was free to

---

concessions to be a mandatory subject of bargaining contained in the contract, the Board nevertheless found no 8(a)(5) or 8(d) violation as the union engaged in voluntary bargaining, and rejected the employer's proposal, and the employer heeded the union's rejection).

[11] Id.

[12] UAW v. NLRB (Milwaukee Spring), 765 F.2d at 180.

[13] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (the Supreme Court specifically mentioned safety practices as a condition of employment in defining the bargaining duty of an employer).

[14] Williston on Contacts § 30.25 (4th ed. 1999) explains that so long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporanous document...

propose modifications to it after affording the Union 60 days notice.[15] After the Employer gave notice of its proposed modifications the Union had a right to bargain over those proposed changes. However, the Union waived that right to bargain through its inaction.[16] The Union was initially put on notice September 15 that the Employer proposed to change the RPP MOU. The Union was again notified on October 12 that the Employer intended to change the RPP MOU on January 1, 2005. At no time did the Union request bargaining.

Given that the RPP MOU cannot be found to be incorporated into the collective bargaining contract under the principles set forth in either Adkins or Milwaukee Spring, and since the Union waived its right to bargain over the proposed changes, the charge should be dismissed, absent withdrawal.

BK

[15] Section 8(d)(1).

[16] Lenz & Riecker, 340 NLRB No. 21 (2003) (once a union has been put on notice that certain actions may be taken by the employer and the union fails to request bargaining over those matters within a reasonable time, it will be deemed to have waived its right to demand bargaining).